

BBNJ IGC-3 Highlights: Thursday, 22 August 2019

The third session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) met on Thursday, 22 August 2019, in an informal working group on environmental impact assessments (EIAs). Delegates also met in two closed-door “informal-informals” to discuss: marine genetic resources (MGRs), including benefit sharing; and area-based management tools (ABMTs), including marine protected areas (MPAs).

Report from Closed Informal-Informals

EIAs: Facilitator René Lefeber (the Netherlands) summarized Wednesday’s informal-informal discussions, which focused on decision making, and the relationship with EIA processes under other relevant global, regional, and sectoral bodies.

On decision making, he noted that divergent positions remain around whether this should take place at the national or international level. He noted delegations discussed suggestions to merge the two alternatives by providing for international decision making if a country so wishes, while retaining national-level decision making for those that prefer it. They further deliberated on distinguishing between “decision making” and “advice” at the international level as well as between “light” and “heavy” access, depending on the severity of harm to the marine environment. Delegates were unable to reach consensus on a provision noting that no decision allowing an activity to proceed shall be made where the EIA indicates severe adverse impacts on the marine environment. Opinions mostly converged around a requirement to make public the decision-making-related documents, with further work remaining on the relevant language.

Regarding the relationship with EIA processes under other relevant global, regional, and sectoral bodies, Lefeber highlighted that participants considered whether: provisions on consistency with UNCLOS and on the EIA process not undermining other relevant bodies are needed or are already covered by the general part of the agreement; to include a reference to “obligations” under the Convention; states parties or a scientific and technical body under the new instrument would cooperate in promoting the use of EIAs in relevant bodies; and there is potential for developing common standards between the agreement and relevant bodies under the discussion on global minimum standards for the conduct of EIAs.

Informal Working Group on EIAs

Screening: NEW ZEALAND suggested distinguishing provisions related to process from those related to content. CANADA offered a proposal to combine provisions on the EIA process into a single article.

On who determines whether an EIA is required, the G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, the AFRICAN GROUP, the EU, P-SIDS, and many

others suggested that a state party shall determine whether an EIA is required in respect of a planned activity under its jurisdiction or control. CARICOM added that the state party, as the responsible entity, may place the burden for screening on the proponent, and NORWAY added that while companies or contractors may carry out the EIA, the international legally binding instrument (ILBI) should only lay obligations on states parties.

On screening considerations for activities requiring an EIA, including characteristics of the area where the planned activity is intended to take place, such as its significance or vulnerability, the LIKE-MINDED LATIN AMERICAN COUNTRIES, with the REPUBLIC OF KOREA, NEW ZEALAND, AUSTRALIA and JAPAN, but opposed by CARICOM and MAURITIUS, requested deleting the provision. ERITREA proposed, opposed by the US, requiring an EIA should an activity take place in, or adjacent to, an area that has been identified as significant for biological diversity conservation and/or human wellbeing. NEW ZEALAND opined that questions about significance or vulnerability could be addressed under thresholds (Article 24). The EU, with NEW ZEALAND, AUSTRALIA, NORWAY, and the US, agreed that screening should consider the characteristics of the area, but, opposed by P-SIDS, noted that significance or vulnerability should not necessarily lead to an EIA requirement.

CANADA proposed that the “initial screening of activities shall be based on thresholds and criteria listed in this part.” The RUSSIAN FEDERATION favored taking a more general approach to determine the threshold. CAMEROON requested more clarity on the threshold, specifically regarding who determines whether an area is ecologically or biologically significant or vulnerable.

On the need for independent assessment, the G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, the AFRICAN GROUP, NEW ZEALAND, NORWAY, INDONESIA, and the HIGH SEAS ALLIANCE noted that if a state party determines that an EIA is not required for a planned activity, it must provide information to support that conclusion. CARICOM, P-SIDS, INDONESIA, CAMEROON, and the HIGH SEAS ALLIANCE said the scientific and technical body should verify that the information provided by the state party satisfies the requirements. The US, with CANADA, preferred language to the effect that states parties must “make information to support that conclusion publicly available.” SWITZERLAND and the HIGH SEAS ALLIANCE supported making the information publicly available, as long as it is also submitted to the scientific and technical body, with SWITZERLAND noting the need for a procedure to deal with problematic cases. The EU, the REPUBLIC OF KOREA, AUSTRALIA, and JAPAN requested deleting the provision, stressing that relevant responsibilities lie with states parties. MAURITIUS requested clarification on how information would be exchanged between the COP and states parties. The RUSSIAN FEDERATION reiterated its opposition to the establishment of a scientific and technical body under the ILBI.

The REPUBLIC OF KOREA, with the RUSSIAN FEDERATION and JAPAN, suggested that provisions dealing with the EIA process would be better placed in the form of voluntary guidelines to support national implementation.

On the relation between the agreement's EIA provisions and those under other bodies, the INTERNATIONAL SEABED AUTHORITY (ISA) drew attention to an information note delineating existing EIA provisions under the Convention, the 1994 Agreement, and the ISA, cautioning against the ILBI diminishing these provisions.

Scoping: On the entity responsible for establishing scoping procedures, the G-77/CHINA, the EU, and SINGAPORE preferred that states parties establish these procedures. CANADA favored "a state party" defining the scope. P-SIDS and the PHILIPPINES expressed preference for the scientific and technical body establishing procedures. The RUSSIAN FEDERATION proposed that a state party define the scope of the EIA in accordance with the guidelines. CARICOM proposed that states parties establish procedures "including public consultation" to establish the scope of the EIA.

On issues within the scope, the LIKE-MINDED LATIN AMERICAN COUNTRIES proposed taking into account social, economic, and cultural and other key impacts, including identified cumulative impacts, supporting, with P-SIDS, also using relevant traditional knowledge. Concurring, CARICOM, IUCN, and the HIGH SEAS ALLIANCE underlined the need to also include alternatives for analysis, including non-action alternatives. SINGAPORE preferred that alternatives for analysis be included "where possible." ERITREA suggested "taking into account interrelated socio-economic, cultural, and human health impacts." The PHILIPPINES urged consultation with coastal states "as early as the scoping stage."

The EU, supported by SWITZERLAND and the HIGH SEAS ALLIANCE, preferred a general high-level description, proposing that scoping "shall identify key environmental impacts and issues, including identifying cumulative impacts, using best available scientific information and traditional knowledge, where relevant." CHINA supported including only key environmental impacts based on best available scientific information and traditional knowledge. SINGAPORE suggested reformulating to "key environmental and, where relevant, social, economic, and cultural issues." The US stated that socio-economic impacts could be considered as a sub-activity. The REPUBLIC OF KOREA stressed that socio-economic impacts are not an appropriate scoping element.

The RUSSIAN FEDERATION reserved its position on including cumulative impacts until the relevant discussion on the definition is concluded.

Impact assessment and evaluation: Regarding the entity ensuring the conduct of the prediction and evaluation of impacts in the EIA be in accordance with provisions in the ILBI, the G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, CARICOM, the AFRICAN GROUP, and others supported that a state party, not the proponent, be responsible. SINGAPORE requested language to clarify that states parties are responsible "as far as practicable," with the US suggesting states parties "shall endeavor" conformity.

The EU proposed that "a state party shall ensure that an EIA, conducted under this part, shall predict and evaluate impacts using the best available scientific information and traditional knowledge, where relevant. Impact assessment and evaluation shall identify and predict the likely environmental impacts of the planned activity and shall include cumulative impacts and impacts in areas within national jurisdiction." The RUSSIAN FEDERATION, with NORWAY, clarified that traditional knowledge should be used "where relevant," and SINGAPORE suggested examining alternatives "where possible." CHINA requested referring to best

available scientific "evidence" and "relevant traditional knowledge." NORWAY proposed creating a separate provision containing information sources relevant for EIAs.

CARICOM, supported by the HIGH SEAS ALLIANCE, proposed including a "no-action alternative" to cover activities not proceeding as a result of an EIA. The DEEP SEA CONSERVATION COALITION (DSCC) pointed to EIA provisions for deep-sea bottom fisheries under the UN General Assembly and regional fisheries management organizations (RFMOs).

Regarding joint EIAs, the G-77/CHINA, P-SIDS, CARICOM, CANADA, and others agreed that nothing in the agreement should preclude them, in particular for SIDS. The EU and INDONESIA suggested that this be extended to all developing countries, with NORWAY calling to delete the provision if it is not open to all countries.

On designating a third party or an independent consultant appointed by a panel of experts established by the scientific and technical body to conduct an EIA, NORWAY emphasized that the state party is legally responsible for the conformity of the EIA and should be free to choose who conducts the EIA. INDONESIA expressed a preference for designating a third party, adding that a list of individual consultants may be developed by the scientific and technical body.

The G-77/CHINA, the AFRICAN GROUP, and P-SIDS emphasized that the two options are not mutually exclusive. The AFRICAN GROUP suggested that a "state party may select a minimum of three experts from a panel of experts designated by the scientific and technical body. The panel of experts may be commissioned by states parties with capacity constraints to conduct an EIA for planned activities," which will then be submitted to states parties for review and decision making. The LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, and CANADA favored a state party having the option to designate a third party to conduct an EIA, and submit it to the state party for review and decision making.

The EU noted lack of clarity around third party involvement, reiterating, with JAPAN and the US, that it is the state party which decides on the conduct of an EIA. CHINA requested referring to a "qualified third party entity" instead of an independent consultant.

On creating a relevant pool of experts, the AFRICAN GROUP supported its creation to assist countries facing constraints in conducting EIAs. The EU, with NEW ZEALAND, NORWAY, and CHINA, emphasized that this could be taken up under capacity building. The LIKE-MINDED LATIN AMERICAN COUNTRIES and the RUSSIAN FEDERATION, opposed by CARICOM and CANADA, requested deleting the provision. SINGAPORE noted the need to consider procedures to address conflicts of interest and, with NORWAY, costs.

In the Corridors

On Thursday, delegates arriving in plenary to discuss EIAs were reminded of the long and intense work ahead to bridge gaps on the most intractable issues under contention. "Some of the informal-informals are getting tense. We are hearing suggestions based on deeply entrenched positions, which are sometimes polar opposites of each other, but no one is yet providing the language to connect these positions," shared one delegate, in deep confidence.

This was echoed by Facilitator Lefeber, who attracted praise among delegates for his facilitating style, offering suggestions to bridge diverging positions. He noted that "views diverged" on whether decisions related to EIAs would be taken at the global or national level. "This goes to the crux of the new treaty," acknowledged one delegate, alluding to the other big issue likely to continue to divide the Conference, which relates to the overarching principle governing the new High Seas treaty: freedom of the high seas versus common heritage of humankind. "These issues will define the course of the entire treaty," opined one delegate, suggesting that the Conference consider designating "a lot more time" to address them.